

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In The Matter of

SECTION 257 PROCEEDING TO
IDENTIFY AND ELIMINATE MARKET
ENTRY BARRIERS FOR SMALL
BUSINESSES

GN Docket No. 96-113

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COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA") is an association comprised in large part of small carriers serving primarily small business and residential users of telecommunications service. As TRA will demonstrate in these Comments, resale is one of the primary market entry vehicles for small businesses and the resale industry is one of a precious few small business success stories in the telecommunications environment. As TRA will further show, there are a number of actions the Commission could take which would facilitate further entry into, and enhance the prospects for long-term survival in, the telecommunications industry by small resale providers. To this end, TRA urges the Commission to take the following actions in furtherance of its statutory mandate to "identif[y] and eliminat[e] . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services":

- In order to ensure that small carriers have access to price points and service offerings commensurate with their traffic volumes, thereby affording these small resale carriers a fair and equitable opportunity to compete, TRA strongly urges the Commission to retain detailed tariffing obligations for the largest network providers, while relaxing such requirements for all other nondominant carriers.
- In order to maintain the integrity of its policy that all common carrier services be available for resale by even the smallest resale providers, TRA urges the Commission to declare unlawful tariff provisions and carrier practices which as a practical matter render service offerings unavailable for resale or unresellable, or otherwise hinder the ability of resale carriers to fully serve their small business or residential customers.
- In order to ensure that small resale carriers' competitive viability is not undermined by abuse of confidential data by their underlying network providers, TRA strongly urges the Commission to implement the safeguards embodied in Section 222(a) & (b) in a manner that will effectively prevent such anticompetitive conduct.
- In order to provide small resale carriers with a workable mechanism for resolving disputes with their underlying network providers, TRA urges the Commission to establish a discrete, streamlined, highly expedited complaint process for airing and resolving carrier-to-carrier disputes brought by resale carriers against their underlying network providers.

- In order to protect the integrity of small resale carriers' long-term service arrangements with their underlying network providers, TRA urges the Commission to declare unlawful, and bar the filing by network providers of, unilateral tariff revisions which modify, without "grandfathering," existing long-term service arrangements.

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**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Comments in response to the Notice of Inquiry, FCC 96-216, released by the Commission in the captioned docket on May 21, 1996 (the "Notice"). The Commission is conducting this proceeding in compliance with the directive of the Telecommunications Act of 1996 ("1996 Act"),¹ as set forth in Section 257 thereof, to "identif[y] and eliminat[e], by regulations pursuant to its authority under [the 1996 Act] . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services."² As an association comprised in large

¹ Pub. L. No. 104-104, 110 Stat. 56, § 101 (1996).

² 47 U.S.C. § 257 (1996).

part of small carriers serving primarily small commercial and residential users of telecommunications service, TRA welcomes the opportunity to work with the Commission to increase and enhance the participation of small business in the telecommunications industry.

I.

INTRODUCTION

TRA, an association of nearly 500 resale carriers and their underlying product and service vendors, was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services and are poised to enter the local exchange market.

TRA's resale carrier members serve generally small to mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small to mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users.

Not yet a decade old, TRA's resale carrier members -- the bulk of whom are small to mid-sized, albeit high-growth, companies -- nonetheless collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars.

The emergence and dramatic growth of the resale industry over the past five to ten years have produced thousands of new jobs and myriad new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

TRA's interest in this proceeding is in promoting greater participation by small resale carriers in the telecommunications industry. To this end, TRA will demonstrate that resale is one of the primary market entry vehicles for small businesses and that the resale industry is one of a precious few small business success stories in the telecommunications environment. TRA will further identify for the Commission means by which to facilitate further entry into, and through which to enhance the prospects for long-term survival in, the telecommunications industry by small resale providers.

II.

ARGUMENT

A. TRA Is Made Up Of Small Businesses Serving Small Business

As noted above, TRA is comprised in large part of small carriers serving primarily small business and residential users of telecommunications service. The average TRA resale carrier member has been in business for five years, serves 10,000 customers, generates annual

revenues of \$10 million and employs in the neighborhood of 50 people.³ In other words, the average TRA resale carrier member is an entrepreneurial enterprise, which has gained a legitimate, but nonetheless precarious, foothold in the telecommunications industry.

The telecommunications resale industry is a maturing market segment comprised of an eclectic mix of established, publicly-traded corporations, emerging, high growth companies and newly created enterprises. Among TRA's resale carrier members, roughly 30 percent have been in business for less than three years and over 80 percent were founded less than a decade ago. And while the growth of TRA's resale carrier members has been remarkable, the large majority of these entities remain relatively small. Nearly 25 percent of TRA's resale carrier members generate revenues of \$5 million or less a year and less than 20 percent have reached the \$50 million threshold. Seventy-five percent of TRA's resale carrier members employ less than 100 people and nearly 50 percent have work forces of 25 or less. Nonetheless, more than a third of TRA's resale carrier members provide service to 25,000 or more customers. And in addition to domestic interexchange and international service, a sizeable percentage of TRA's resale carrier customers are already offering their customers local, wireless and/or internet access services.

TRA's resale carrier members primarily serve small businesses, although residential and mid-sized commercial accounts are not uncommon; indeed, a sizeable percentage of TRA's resale carriers serve both the residential and commercial markets. The majority of TRA's resale carrier members generate more than 80 percent of their revenues from commercial accounts; revenues generated by residential accounts represent less than 20 percent of total company

³ The data summarized in this section are drawn from a series of surveys undertaken by TRA of its membership over the past two years.

revenues for more than 75 percent of TRA's resale carrier members. The large preponderance of the commercial accounts served by TRA's resale carrier members range from \$100 to \$1,000 a month. Accounts generating in excess of \$5,000 a month are the exception.

**B. The Critical Role Of Small Business In
Today's Economy**

Small business is the engine that is currently driving the U.S. economy; indeed, small firms are increasingly recognized as key job creators and innovators. As summarized in The State of Small Business: A Report of the President 1994:

Small businesses are a critical part of our economy. They employ almost 60 percent of the work force, contribute 54 percent of the sales, account for roughly 40 percent of gross domestic product, and are responsible for 50 percent of private sector output. More than 600,000 new firms have been created annually over the past decade, and over much of this period, small firms generated many of the Nation's new jobs. . . . [E]ntrepreneurial small businesses are also strong innovators, producing twice as many significant innovations as their larger counterparts.

Elaborating on some of these themes, the U.S. Small Business Administration reports that the number of businesses in the United States has grown at a compound rate of 3.9 percent since 1981, with new incorporations reaching record highs in the 1990s.⁴ This growth in turn is fueled by an explosive increase in the number of small businesses, producing a fundamental "restructuring of the U.S. industry."⁵

⁴ The Annual Report on Small Business and Competition, The U.S. Small Business Administration, 13, 34-40, U. S. Government Printing Office, Washington, 1995; Handbook of Small Business Data, The U.S. Small Business Administration, Office of Advocacy, 7, U. S. Government Printing Office, Washington, 1994.

⁵ The Annual Report on Small Business and Competition at 15, 43-46.

More than 50 percent of the 92 million private sector employees in the United States work for firms with fewer than 500 employees and "the greatest gains in employment were in growing industries with the highest percentage of employment in small firms."⁶ Moreover, "[s]mall firms are expected to contribute about 70 percent of the new jobs in the nation's fastest growing industries between 1990 and 2005, and about 66 percent of the 23.3 million jobs projected to be created between 1990 and 2005."⁷ And this growing army of small business employees produce innovations and significant innovations at twice the rate of their large firm counterparts and convert research and development efforts into patents and new product and service offerings far more efficiently than do large firm employees.⁸

As succinctly stated by President Clinton: "[A] great deal of our Nation's economic activity comes from the record number of entrepreneurs living the American Dream. . . . I firmly believe that we need to keep looking to our citizens and small businesses for innovative solutions. They have shown they have the ingenuity and creative power to make our economy grow; we just need to let them do it."⁹

⁶ Id. at 14, 46-57.

⁷ Handbook of Small Business Data at 1.

⁸ The Annual Report on Small Business and Competition at 15; Report of the FCC Small Business Advisory Committee to the Federal Communications Commission, 8 FCC Rcd. 7820, 7828 (1993). McGuire, Terrance P., "A Blueprint for Growth or a Recipe for Disaster? State Sponsored Venture Capital Funds for High Technology Ventures, 7 Harv. J.L. & Tech., 419, 420 (Spring 1994).

⁹ The State of Small Business: A Report of the President 1994 at 7.

C. Telecommunications Resale: A Small Business Success Story

As the Notice acknowledges, "small businesses currently constitute only a small portion of telecommunications companies." Moreover, while the number of small businesses providing telecommunications products and services continues to increase, the market share held by these entities continues to decline.¹⁰ Against this anemic backdrop, the telecommunications resale industry represents an impressive success story.

The telecommunications resale industry is populated with literally thousands of small, but growing resale providers of an increasing number and variety of telecommunications products and services. Interexchange resale carriers -- the most established sector of the resale community -- are estimated to control five to ten percent of the long distance market, serving millions of small commercial and residential users and generating annual revenues in the billions of dollars.¹¹ Indeed, resale carriers now comprise nearly half of the 20 largest providers of long distance service in the United States.¹² Resale of international telecommunications services is also exploding.¹³ Wireless resale, including resale of cellular telephone, paging and now personal

¹⁰ The Annual Report on Small Business and Competition at Appx A; Report of the FCC Small Business Advisory Committee to the Federal Communications Commission, 8 FCC Rcd. 7820 at 7826.

¹¹ Long Distance Market Shares (First Quarter 1996), Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Table 6 (July 1996).

¹² Id.

¹³ U.S. Department of Commerce, U.S. Industrial Outlook 1994, Chapter 29, pp. 29-8 - 29-11; Trends in the International Telecommunications Industry, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, p. 37 (June 1995). See VIA USA, Ltd., 9 FCC Rcd. 2288, ¶ 11 (1994), *aff'd* 10 FCC Rcd. 9540 (1995) ("The Commission has long recognized that increased competition in the international marketplace benefits U.S. ratepayers, and has routinely granted applications for Section 214 authorizations for the resale of international switched voice service to further that goal.").

communication services, continues to expand.¹⁴ And resale carriers are already entering the local exchange/exchange access market now that the 1996 Act has eliminated legal barriers to entry.¹⁵

The success of the telecommunications resale industry and its predominantly small business participants is derived from two sources -- regulatory intervention and market performance. TRA and its resale carrier members are well aware that the emergence, growth and development of a vibrant telecommunications resale industry is a direct product of a series of pro-competitive initiatives undertaken, and pro-competitive policies adopted, by the Commission over the past decade. The Commission long ago adopted, and continues to enforce, policies which require that "all common carriers . . . permit unlimited resale of their services."¹⁶ To this end, the Commission affirmatively deems unjust and unreasonable, and prohibits restrictions on, resale.¹⁷ Indeed, the Commission has declared that any "[a]ctions taken by a carrier that effectively obstruct the Commission's resale requirements are inherently suspect"¹⁸ and that "resale restrictions are presumptively unreasonable."¹⁹ As the Commission explained:

¹⁴ See, e.g., "From a Resale Point of View," Mobile Phone News, Vol. 14, No. 1 (Jan. 1, 1996); "MCI Buys SHL Systemhouse; Closes Nationwide Purchase," Communications Today (Sept. 20, 1995).

¹⁵ 47 U.S.C. § 253; see, e.g., "Local Competition in East Enters Negotiation Phase," Telco Business Report, Vol. 13, No. 15 (July 15, 1996).

¹⁶ AT&T Communications: Apparent Liability for Forfeiture and Order to Show Cause, 10 FCC Rcd. 1664, ¶2 (1995), *pet. for rev. pending AT&T Corp. v. FCC*, Case No. 95-1339 (filed July 5, 1995) ("AT&T Forfeiture Order").

¹⁷ Resale and Shared Use of Common Carrier Services, 60 F.C.C.2d 261, 298-99 (1976) ("Resale and Shared Use Order"), *recon.* 62 F.C.C.2d 588 (1977), *aff'd sub nom. American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Services, 83 F.C.C.2d 167 (1980), *recon.* 86 F.C.C.2d 820 (1981).

¹⁸ AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶ 13.

¹⁹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 939 (released August 8, 1996), *pet. for rev. pending sub nom. Iowa Utilities Board v. FCC*, Case No. 96-3321 (8th Cir. Sept. 5, 1996) ("Local Competition Order").

Given the probability that restrictions and conditions may have anticompetitive results, we conclude that it is consistent with the procompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable . . .²⁰

The Commission has long recognized that the resale of telecommunications services generates "numerous public benefits," among which are the downward pressure resale exerts on rates and the enhancements resale produces in the diversity and quality of product and service offerings.²¹ The Commission recently enumerated the "important public benefits" resale confers:

First, the economic literature on resale price maintenance illustrates that prohibiting resale restrictions may reduce the likelihood of systematic price discrimination and cartel behavior. Second, in the wireline context the resale rule has been found to promote the public interest by: (1) encouraging competitive pricing; (2) discouraging unjust, unreasonable, and unreasonably discriminatory carrier practices; (3) reducing the need for detailed regulatory intervention and the administrative expenditures and potential for market distortions that may accompany such intervention; (4) promoting innovation and the efficient deployment and use of telecommunications facilities; (5) improving carrier management and marketing; (6) generating increased research and development; and (7) positively affecting the growth of the market for telecommunications services. Third, we have recognized the public interest benefits of resale in the wireless context, and have facilitated them by explicitly conditioning cellular licenses on adherence to our resale policy. In particular, we have recognized that resale of wireless services can speed the deployment of competition by permitting new entrants to begin offering to the public before they have built out their facilities.²²

Moreover, the Commission stressed the importance of resale "in markets that have not achieved full competition," noting that "an active resale market helps to replicate many of

²⁰ Local Competition Order, FCC 96-325 at ¶ 939.

²¹ Id. at ¶ 12.

²² Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 96-263, ¶ 10 (released July 12, 1996).

the features of competition . . . [and] hastens the arrival of competition by speeding the development of new competitors."²³ The Commission also recently acknowledged that resale would be "an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks."²⁴ "In light of the strategic importance of resale to the development of competition", the Commission concluded that it was "especially important to promulgate rules for use by state commissions in setting wholesale rates" and to "reduce unnecessary burdens on resellers seeking to enter local exchange markets" by presuming resale restrictions and conditions to be unreasonable.²⁵

But, as noted above, regulatory intervention -- albeit an absolutely critical factor -- is only half of the reason for the remarkable success of the telecommunications resale industry. The other impetus is market performance. Resale carriers identify market niches that larger, facilities-based providers either cannot serve or do not wish to serve and provide these market niches with service offerings that would not otherwise be available to them. As the Notice recognizes, "small businesses are able to serve narrower niche markets that may not be easily or profitably served by large corporations, especially as large telecommunications expand globally."²⁶ As noted above, resale carriers serve primarily small commercial users, providing these entities with access to rates, service offerings, billing options and customer support that are generally reserved by larger facilities-based carriers for their larger volume users. In contrast,

²³ Id. at ¶ 11.

²⁴ Local Competition Order, FCC 96-325 at ¶ 907.

²⁵ Id. at ¶¶ 907, 939.

²⁶ Notice, FCC 96-216 at ¶ 6.

larger facilities-based competitors tend to focus their sales and customer support efforts on residential and large commercial users.

The success of the efforts of the resale community in this regard is evident in its rapid accumulation of market share. The small carriers that populate the resale industry have achieved a five to ten percent share of the interexchange telecommunications market in less than a decade. In so doing, they have not only bested such formidable competitors as AT&T Corp. ("AT&T"), MCI Telecommunications Corporation ("MCI") and Sprint Corp. ("Sprint"), but have often had to overcome anticompetitive abuses by the carriers from whom they by necessity had to acquire network services. Resale carriers have been successful because they have provided affordable rates, quality service, attractive service offerings and personalized attention. The proof, to use an old cliché, is in the pudding; if a small unknown carrier is not delivering on its commitments, it will not retain its customers given the presence of competitive alternatives the likes of those offered by AT&T, MCI and Sprint.

**D. Barriers To Market Entry And Long-Term Survival
And Success Confronting Small Resale Carriers**

As TRA has noted in previous submissions to the Commission, the relationship between resale carriers and their network providers is an awkward one at best. On the one hand, even small resale carriers are large customers, representing substantial sources of revenues for their underlying carriers.²⁷ Resale carriers are also, however, aggressive competitors that utilize

²⁷ Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880, ¶ 115 (1991) ("First Interexchange Competition Order"), 6 FCC Rcd. 7255 (1991), 6 FCC Rcd. 7569 (1991), 7 FCC Rcd. 2677 (1992), *recon.* 8 FCC Rcd. 2659 (1993), 8 FCC Rcd. 3668 (1993), 8 FCC Rcd. 5046 (1993), *recon.* 10 FCC Rcd 4562 (1995) ("[R]esellers, like other users, are valued customers -- in fact, they are large customers. It is not reasonable to assume that AT&T will refuse to present them with viable service options at reasonable rates.").

whatever "price breaks" they secure from their network providers as a result of their substantial traffic volumes to compete for the small and mid-sized accounts that would otherwise provide these underlying carriers with their highest "margins."

As a result, network providers tend to be somewhat schizophrenic in their dealings with their resale carrier customers, treating resale carriers in some instances with the solicitude that they show large corporate accounts and on other occasions attacking resale carriers as they would any other competitor. Resale carrier customers, however, are not like other rival providers; they are dependent on their network providers for service and hence are very vulnerable to anticompetitive abuses perpetrated by such entities.²⁸ An underlying carrier can devastate a resale carrier customer's business, for example, by not allowing it access to rates and services provided to large corporate users with comparable traffic volumes, by not provisioning its service orders in a timely manner or refusing other operational support, by providing it with untimely, incomplete or inaccurate billing tapes, and/or by using for its own marketing and other competitive advantage competitively-sensitive information received from the resale carrier.

The Commission recently acknowledged the adverse competitive impact of inferior access to operations support functions:

[I]f competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the

²⁸ The degree of awkwardness tends to increase with the size of the network provider. The odds are that one out of every two customers secured by a resale carrier would be taken from a network provider with a 50 percent market share, while only one out every ten customers obtained by a resale carrier would be taken from a network provider with a ten percent market share. While the latter network provider might view resale carriers as a necessary evil, the former will try mightily to avoid providing resale carriers with service at prices that would allow for viable resale.

same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged.²⁹

Thus, the Commission directed incumbent local exchange carriers ("ILECs") to provision services for resale "with the same timeliness as they are provisioned to that incumbent LEC's subsidiaries, affiliates, or other parties to whom the carrier directly provides the service, such as end users."³⁰ Likewise, the Congress recognized the importance of providing resale carriers with access to discounted rates when it required ILECs to make available at wholesale rates all services they offer at retail to subscribers.³¹ The Commission concurred in this assessment:

In light of the strategic importance of resale to the development of competition, we conclude that it is especially important to promulgate national rules for use by state commissions in setting wholesale rates.³²

As a result, the resale community is itself somewhat schizophrenic in its view of regulation. All things being equal, TRA submits that market forces are generally superior to regulation in promoting the efficient provision of diverse and affordable telecommunications products and services. The market, however, is an effective regulator only if market forces are adequate to discipline the behavior of all market participants; if one or more such participants retains vestiges of market power, regulatory intervention is essential to protect the public interest. Obviously, no telecommunications market is perfectly competitive; in every telecommunications market a limited number of entities retains the bulk of the market share. Regulatory intervention,

²⁹ Local Competition Order, FCC 96-325 at ¶ 518.

³⁰ Id. at ¶ 970.

³¹ 47 U.S.C. § 251(c)(4).

³² Local Competition Order, FCC 96-325 at ¶ 907.

therefore, continues to be necessary to ensure opportunities for small resale carriers in markets that are still dominated by much larger providers.

TRA submits that when the Congress directed the Commission to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications and information services," it was not merely directing the Commission to reduce the regulatory burden on small telecommunications providers. Rather, it was calling for affirmative, proactive action by the Commission to facilitate greater participation by small business in the telecommunications industry. Such action could be deregulatory, but it also could require regulatory measures. Given the serious imperfections in most, if not all, telecommunications markets, regulatory intervention remains necessary to ensure a viable resale industry.

The Commission recognized as much in crafting rules implementing Sections 251 and 252 of the 1996 Act, recognizing the hurdles small carriers, as new entrants into the local exchange telecommunications market, would face in confronting entrenched incumbent local exchange carriers ("ILECs") possessed not only of monopoly market power, but orders of magnitude greater resources.³³ Thus as a general matter the Commission explained that it adopted "national rules" where:

they facilitate administration of sections 251 and 252, expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of

³³ 47 U.S.C. § 251, 252.

litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish.³⁴

Such an approach, the Commission correctly reasoned, would "assist smaller carriers that seek to provide competitive local service:"

[N]ational rules will greatly reduce the need for small carriers to expend their limited resources securing their right to interconnection, services, and network elements to which they are entitled under the 1996 Act. This is particularly true with respect to discrete geographic markets that include areas in more than one state. We agree with the Small Business Administration that national rules will reduce delay and lower transaction costs, which impose particular hardships for small entities that are likely to have less of a financial cushion than larger entities. In addition, even a small provider may wish to enter more than one market, and national rules will create economies of scale for entry into multiple markets.³⁵

Detailing its rationale for so concluding, the FCC emphasized the "inequality of bargaining power between incumbents and new entrants," explaining that "[n]egotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires."³⁶ Rather, "[u]nder section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market."³⁷ Given the "strong incentives" ILECs, like any other monopolists, will

³⁴ First Report and Order, FCC 96-325 at ¶ 41.

³⁵ Id. at ¶ 61 (footnotes omitted).

³⁶ Id. at ¶ 55.

³⁷ Id.

have to resist such market intrusion, "rules that have the effect of equalizing bargaining power" are necessary to facilitate competitive entry.³⁸

TRA urges the Commission to pursue a like proactive approach here, taking in so doing the regulatory actions set forth below in furtherance of its obligations under Section 257.

1. The Commission Should Adopt The 'Relaxed' Tariffing Proposals Presented By TRA In CC Docket No. 96-61

In CC Docket No. 96-61, the Commission has proposed to adopt a "mandatory detariffing policy" for the domestic service offerings of non-dominant interexchange carriers ("IXCs").³⁹ In Comments and Reply Comments filed with the Commission, TRA strongly opposed that action, urging the Commission to continue to require non-dominant IXCs to file tariffs applicable to their domestic offerings, but to modify its current tariffing requirements in so doing to better reflect the "substantially competitive" interstate, interexchange telecommunication market.⁴⁰ To this end, TRA recommended that the Commission adopt a bifurcated tariffing scheme for domestic non-dominant carriers which would substantially relax tariffing requirements for all but the largest carriers. With the exception of those IXCs that are affiliated with an ILEC, TRA proposed that carriers which generate less than five percent of aggregate domestic interstate toll revenues should be permitted to specify "maximum" or a "reasonable range" of rates and file tariffs on a single day's notice. IXCs that generate five

³⁸ Id.

³⁹ Policies and Rules Governing the Interstate, Interexchange Marketplace, CC Docket No. 96-61, FCC 96-123, ¶¶ 21 - 39 (released March 25, 1996).

⁴⁰ Comments and Reply Comments of the Telecommunications Resellers Association in CC Docket No. 96-61, filed April 25, 1996, and May 24, 1996, respectively.

percent or more of aggregate domestic interstate toll revenues or who are affiliated with an ILEC would continue to be required to include in their tariffs detailed price schedules for their domestic offerings and to provide fourteen days' notice of tariff revisions which impact existing long-term service arrangements.

In support of its recommendation that tariffing requirements be retained, TRA explained that the largest carriers often deny resale carriers access to the superior service offerings and preferred price points they make available to large corporate users with commensurate (and in far too many instances, substantially lower) traffic volumes.⁴¹ Resale carriers, TRA observed, have been able to overcome such "refusals to deal" by taking "off-the-shelf" customer-specific large corporate offerings which the Commission now requires to be filed

⁴¹ These are not mere theoretical concerns. For example, within the last two years, the Commission issued a Notice of Apparent Liability for Forfeiture in the amount of One Million dollars against AT&T based upon the carrier's failure to honor service orders for Contract Tariff No. 383 submitted by three resale carriers. The Commission concluded that "AT&T's failure to provide the requested communications service constitute[d] an apparent breach of its common carrier obligation to provide a tariffed service upon reasonable request as set forth in Section 201(a) of the Act." AT&T Communications: Apparent Liability for Forfeiture and Order to Show Cause, 10 FCC Rcd. 1664, ¶2 (1995), *pet. for rev. pending AT&T Corp. v. FCC*, Case No. 95-1339 (filed July 5, 1995). The Commission further faulted AT&T under Section 201(a) for failing to accept a resale carrier's order for Virtual Telecommunications Network Services ("VTNS") Option 24, ruling at the same time that an AT&T requirement that resale carriers provide detailed location and network design information as a precondition to receipt of service constituted "an unjust and unreasonable practice within the meaning of Section 201(b) of the Act" and "an unreasonable restriction on resale in violation of [the Commission's] resale orders and requirements." Public Service Enterprises of Pennsylvania, Inc. v. AT&T Corp., 10 FCC Rcd. 8390, ¶¶ 12, 17, 19 (1995), *remanded Civ. No. 95-1339* (D.C.Cir. June 21, 1996). The Commission also initiated two investigations of AT&T during the past two years which addressed efforts by the carrier to unilaterally alter material terms and conditions of Contract Tariff Nos. 360 and 374 following receipt of applications for service thereunder by resale carriers. AT&T Communications Contract Tariff No. 360, Transmittal No. CT 3076, CC Docket No. 95-80, DA 95-1244 (released June 5, 1995), *dismissed as moot*, DA 96-687 (released May 3, 1996); AT&T Communications Contract Tariff No. 374, Transmittal Nos. 2952 and 3441, DA 95-1061 (released May 10, 1995). And, of course, there have been numerous formal complaints lodged by resale carriers with the Commission alleging failure by AT&T to provide service under additional service offerings.

as tariffs.⁴² Where resale carriers have been able to forge their own deals with network providers, TRA reported, they have been able to drive rates downward by referencing large corporate rates on file with the Commission.

TRA further explained that in a detariffed environment, the Commission's resale, "general availability" and non-discrimination policies would be rendered "toothless." Resale carriers would not be able to select large corporate offerings "off-the-shelf" because such offerings would no longer be filed as tariffs and without filed tariffs, only the network provider (and not the resale carrier) would know how far large corporate rates had been reduced. Network providers would be able to discriminate at will against resale carriers, unlawfully denying them, and ultimately, their small business and residential users, access to the rates and services to which they are legally entitled.

Merely making detariffing permissive rather than mandatory, TRA continued, would fail to remedy these concerns; indeed, permissive detariffing would potentially create the worst of all worlds for resale carriers. Underlying carriers could refrain from filing as tariffs the highly attractive offerings they make available to large corporate users, thereby denying resale carriers the opportunity to avail themselves of these preferred services and price points, while at

⁴² The Commission, in order to avoid discrimination, among other reasons, required AT&T to make virtual telecommunications network services ("VTNS") options and contract tariffs "generally available." First Interexchange Competition Order, 6 FCC Rcd. 5880 at ¶ 112; AT&T Communications, Revisions to Tariff F.C.C. No. 12, 4 FCC Rcd. 4932, 4938-39 (1989) ("Tariff 12 Order"), *recon.* 4 FCC Rcd. 7928 (1989) *remanded* MCI Telecommunications Corp. v. FCC, 917 F.2d 30 (D.C.Cir. 1990), *on remand* 6 FCC Rcd. 7039, 7050-52 (1991). Thus, in responding to arguments that "contract carriage [would] have an adverse effect on resellers," the Commission noted that "the terms of AT&T's contracts must be filed with the Commission and made available to all similarly situated customers." First Interexchange Competition Order, 6 FCC Rcd. 5880 at ¶ 115. Moreover, the Commission declared, with respect to VTNS Options, that it would "scrutinize closely any restrictive eligibility requirements to ensure that they are not pretexts for unreasonably discriminating among customers." Tariff 12 Order, 4 FCC Rcd. 4932 at ¶ 64.

the same time filing as tariffs their service arrangements with resale carriers, thereby reserving to themselves the right, at least potentially, to unilaterally modify these arrangements through tariff revisions. Moreover, given that it is by no means certain that voluntarily-filed tariffs would have the same "force of law" as statutorily-mandated tariffs, it is not at all clear that permissive detariffing would relieve carriers of the administrative burdens that would arise in the absence of filed tariffs, potentially requiring renegotiation of many, if not all, existing long-term service arrangements and resulting in massive future contract and notice requirements.

To ensure that small carriers have access to price points and service offerings commensurate with their traffic volumes, thereby affording these small carriers a fair and equitable opportunity to compete, TRA strongly urges the Commission to retain tariffing obligations for the largest network providers.

**2. The Commission Should Declare Unlawful Tariff Provisions
And Carrier Practices Which Have The Practical Effect Of
Limiting Resale**

As noted previously, the Commission requires that "all common carriers . . . permit unlimited resale of their services,"⁴³ and prohibits restrictions on resale;⁴⁴ indeed, the Commission has declared that any "[a]ctions taken by a carrier that effectively obstruct the Commission's resale requirements are inherently suspect."⁴⁵ Not all restrictions on resale, however, are overt. If, as a practical matter, a requirement or a practice renders a service offering either unavailable to resale carriers or unresellable, the effect is no less pernicious than an express prohibition on

⁴³ AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶ 2.

⁴⁴ Resale and Shared Use Order, 60 F.C.C.2d 261 at 298-99.

⁴⁵ AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶ 13.

resale. Commission action with regard to the former is thus no less important than it is with regard to the latter if the Commission's pro-competitive resale policies are to continue to have meaning. TRA, accordingly urges the Commission here, as it did in CC Docket No. 96-61,⁴⁶ to scrutinize closely "[a]ctions taken by a carrier that effectively obstruct the Commission's resale requirements" and to view such actions as "inherently suspect."⁴⁷ Critically, the Commission must look beyond the superficial rationales offered by network providers to justify such actions and examine their impact on the availability of service offerings for resale.

As TRA explained in CC Docket No. 96-61, network providers have employed, and continue to employ, a number of stratagems to render particular service offerings effectively unavailable for resale. Blatant prohibitions on resale still appear in contracts, but most resale limitations are somewhat more subtle. One common approach is to limit the manner in which a service offering may be used. Thus, for example, a limitation on the number of locations a service offering may serve renders that offering unavailable for resale. Obviously, a service offering which can only be utilized at 20, or 50, or even 100 locations cannot be broadly resold. Capping discounts at a specified revenue level and thereafter charging a higher price has a like effect. If, for example, only the first 100,000 minutes are discounted, the service offering will not be usable to serve a large number of entities. Similarly, limiting the percentage of switched, versus dedicated, access will generally prevent resale of an interexchange service offering, given that the preponderance of resale customers are small to mid-sized businesses which do not generate traffic volumes that justify use of dedicated access. All major network providers impose

⁴⁶ Comments of the Telecommunications Resellers Association in CC Docket No. 96-61, filed April 25, 1996.

⁴⁷ AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶ 13.

such limits and caps and all, despite their protestations to the contrary, do so to prevent resale of selected service offerings.

Another approach is to erect obstacles to obtaining service which resale carriers generally cannot overcome. As noted previously, the Commission has sanctioned AT&T for conditioning the availability of VTNS Options on the submission of detailed location and network design information which resale carriers, because of the nature of their business, simply cannot provide. As the Commission explained:

We also find that AT&T's insistence on the detailed advanced information at issue constitutes an unreasonable restriction on resale in violation of our resale orders and requirements, as specifically made applicable to Tariff 12 options by our Tariff 12 Orders. . . [T]he advance requirements pose substantial burdens on resale customers . . . because they often do not have and, therefore, cannot provide all the network design information in advance due to the nature of their operations. We have carefully considered AT&T's rationale for its advance information requirements but find no valid business purpose for the requirements, as applied to resale or non-resale customers, that would justify the substantial burdens this practice imposes. Requirements such as those at issue here have the effect of discouraging resale, thus undermining our pro-competitive policies enunciated in our resale orders.⁴⁸

Other barriers are equally effective at preventing resale carriers from obtaining service offerings. For example, deposit requirements which are tied to the percentage of a customer's annualized commitment that will be generated initially or shortly after initiation of service adversely impact resale carriers alone because unlike other corporate users, resale carriers "ramp-up" usage over the course of their service terms. Ordering procedures which require resale carriers to disclose competitively-sensitive information before a service order is accepted or approved similarly deter resale carriers from seeking particular service offerings.

⁴⁸ Public Service Enterprises of Pennsylvania, Inc. v. AT&T Corp., 10 FCC Rcd. 8390 at ¶ 19.